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ROOTING FOR THE RESTYLED RULES (EVEN THOUGH I OPPOSED THEM)

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Abstract

The Restyling Amendments of December 1, 2007 made top-to-bottom changes to the text of the most important and successful set of rules in the American civil justice system. These amendments are the culmination of more than fifteen years of work by members of the Rules Committees and their style consultants. The goal of these Restylists was to redraft the Rules to improve style and clarity without changing meaning. In short, they sought to achieve "clarity without change." The Restylists are confident they achieved this goal, but not everyone shares their confidence. Critics worry that the Restylists made unwanted changes to the law of procedure, despite their best efforts to avoid them. Critics also believe that improving merely the style and clarity of Rules did not justify the costs of transitioning from one set of rules to another and that the Restylists may have sacrificed other more important reforms on the altar of the Style Project. I have never been certain that the criticisms are accurate, but I decided that an improvement in the mere style of the Rules did not justify much uncertainty. For this reason, I joined other critics in opposing the enactment of the Restyling Amendments in an essay titled The Restyling of the Federal Rules of Civil Procedure: A Solution in Search of a Problem. Now that the Restyling Amendments are effective, however, I am rooting for their success and urging other critics to do the same. Whether the Restyling Amendments should have been adopted in the first place is now moot. The issue now is what we can do to maximize the chance that the Restyled Rules will succeed, despite their faults. This year alone, the Restyled Rules will affect the rights and obligations of hundreds of thousands of litigants. We must hope and work to ensure that the Rules function as their supporters believed they would rather than as critics like me feared they would. This article is a call to optimism and action. It calls for critics to be optimistic that the Rules will not be the disaster we feared and provides the rationale for that optimism. This article also calls for action on the part of the Advisory Committee to eliminate the known and undesirable substantive changes resulting from the Restyling. This critical support and Advisory Committee action will help to ensure that the Federal Rules of Civil Procedure are a model of both clarity and procedure.

I. INTRODUCTION

On December 1, 2007, the words of nearly every Federal Rule of Civil Procedure changed when the so-called "Restyling Amendments" took effect.[2] These amendments were the product of a decade and a half of work by members of the Standing Committee on Rules of Practice and Procedure, the Style Subcommittee, the Advisory Committee on Civil Rules, and their style consultants.[3] The goal of these Restylists was to change the words of nearly all the Rules in order to improve their style and clarity without changing the meaning of any one of them. This goal raised several questions in my mind, and in the minds of many others whose opinions I have come to respect. Can one change the language of the Law without changing its meaning? Do stylistic improvements justify the cost of transitioning from one set of rules to another? What important reforms were sacrificed at the altar of the Style Project during the fifteen years it dominated the time of the Rules Committees?

I was not certain of the answers to these questions, but, in the end, I decided that an improvement in the style of the Rules did not justify the uncertainty. For this reason, I opposed the enactment of the Restyling Amendments.[4] If I could turn the clock back to a time before their December 1, 2007 effective date, I would oppose them all over again. But now, for better or worse, the Restyled Rules govern procedure in all civil actions in the United States District Courts. The clock striking midnight on December 1 mooted the issue of whether the Restyled Rules should be adopted. Now the issue is

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[2] Order of the Supreme Court of the United States, April 30, 2007, available at www.uscourts.gov/rules/supct1106/Trans-Orders.pdf (providing December 1, 2007 effective date). *See also* Letters from John G. Roberts, Chief Justice, United States Supreme Court, to Honorable Dick Cheney, President, United States Senate, and Honorable Nancy Pelosi, Speaker of the House of Representatives, April 30, 2007, *available at* www.uscourts.gov/rules/supct1106/Trans-Orders.pdf. Transmittal of the amendments to Congress by May 1, 2007 permits an effective date of December 1, 2007 pursuant to the Rules Enabling Act, 28 U.S.C. § 2074(a) (1988).

[3] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2006), *available at* http://www.uscourts.gov/rules/Appendix_D.pdf (reporting the 1992 start date of the Style Project and the major participants in it).

[4] Jeremy Counseller and Rory Ryan, *The Restyling of the Federal Rules of Civil Procedure: A Solution in Search of a Problem*, WASH L. REV. SLIP OPINIONS (2007), available at http://washulrev.blogspot.com/2007_11_07_archive.html.

what we can do to maximize the chance that the Restyled Rules will succeed. This year alone, the Restyled Rules will affect the rights and obligations of hundreds of thousands of litigants.[5] We must hope and work to ensure that the rules function as their supporters believed they would rather than as critics like me feared they would. We have to root for the Restyled Rules now.

My work on this article has tempered my own concerns about the effects of the Restyling Amendments. As much as anything else, this article may reveal the evolution of one observer's thinking on the subject—a journey from diametric opposition to cautious, grudging optimism that, with some changes by the Advisory Committee, the Restyled Rules may not be the disaster I feared. My optimism comes from the fact that the Restyled Rules *are* clearer than the old rules. In most cases, the Restyled Rules undoubtedly express the same meaning as the old rules but do so in shorter, crisper sentences that avoid antiquated legalese and near impenetrable syntax. I am grudging in my optimism because I believe the Restylists should not have made top-to-bottom changes to the Federal Rules under the label of a "Style Project." Such a label discourages and misdirects public comment because, after all, no substantive changes will result, or so all are told, and, therefore, any comments should be directed to the new, improved *style* of the rules.

Optimism aside, the simple truth is that the former Federal Rules of Civil Procedure are past the point of no return. Criticisms of the Restyling Amendments that were valid before their effective date no longer are. Much of the transition cost has already been incurred and, if the Restyling delayed more important reform, nothing can change that fact now. Indeed, returning to the old rules would carry its own transition costs and only further delay other reform. In other words, we have to make the best of the Restyled Rules for many of the same reasons the Restylists should not have created them in the first place.

This article aspires to set forth a rationale for supporting the Restyled Rules that is persuasive even to critics and to describe what

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[5] Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Table C, *available at* http://www.uscourts.gov/caseload2007/tables/C00Mar07.pdf. This projection of the magnitude of the Restyled Rules' impact in 2008 is based upon recent federal court civil caseload statistics. In 2007, 278,272 civil cases were commenced in the federal district courts. This was a 14% increase over 2006.

the Advisory still has left to do in order to maximize their chance of success. At a minimum, however, it is hoped that this article smoothes the transition from the former Rules to the Restyled Rules by serving as an educational resource to the Rules' users. Part II of this article discusses the origins and evolution of the Style Project and concludes that, because of the quality of the Restylists and their effort and because of the quality of the criticism from the Group, even critics will find rooting for the Restyled Rules palatable. Part III discusses the fact that rooting for the Rules is necessary because, at this point, we neither can nor should return to the former Rules. Part IV calls for action on the part of the Advisory Committee to maximize the chances of the Restyled Rules' success. The Advisory Committee must repair the clear and undesirable substantive changes it inadvertently made to the discovery rules and must continue to resist any call for a rule of construction to prevent the Restyling Amendments from superseding other laws.

II. EVEN A CRITIC CAN ROOT FOR THE RESTYLED RULES

Rooting for the Restyled Rules is also palatable, even to a critic. The stature of the Restylists and the effort they put into the project command respects and provide hope that the negative effects of the Restyling Amendments will be limited. Critics should also find it easier to root for the Restyled Rules because a group of critics had a significant and positive impact on the final version of the Restyled Rules.

A. The Restylists and Their Effort Command Respect

The Restyled Rules are the product of the extraordinarily hard work of some of the leading procedural experts and practitioners in the country. The reputations and effort of the Restylists gives even the staunchest of critics pause and should give everyone a reason to root for the success of the amendments.

1. The Auspicious Origins of the Style Project

To achieve their goal of improving only the style of the rules they had to change the wording of all the rules without changing the

meaning of even one. A mere glimpse of the project's magnitude makes one wonder how any single person, much less multiple committees with rotating memberships, could be convinced to embark on so difficult and daunting, if not impossible, a task. But, in defense of the Restylists, it was no mere mortal who convinced them to begin their Herculean challenge. The reason our federal rules are restyled is because the late Prof. Charles Alan Wright thought they needed to be.[6]

Although the project would not have succeeded without Professor Wright's support, the project was actually the brain child of another man, Judge Robert Keeton.[7] The restyling project began shortly after Judge Keeton became Chair of the Standing Committee on Rules of Practice and Procedure in the fall of 1990.[8] Judge Keeton believed that significant time and talent was being wasted making and interpreting the various sets of federal rules.[9] Judge Keeton lamented the fact that, in 1990, there were five sets of Federal

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[6] JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Sept. 1991), 3, available at http://www.uscourts.gov/rules/Reports/ST09-1991.pdf (reporting creation of Style Subcommittee); Judge Robert E. Keeton, *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at i, ii, Administrative Office of the United States Courts (1996), *available at* http://www.uscourts.gov/rules/guide.pdf (noting Prof. Wrights Acceptance of Chairmanship of Style Subcommittee). *See also* REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, 2 ("Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to undertake the work. . . ").

[7] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2006), *available at* http://www.uscourts.gov/rules/Appendix_D.pdf ("The Style Projects began in 1992 with Judge Robert E. Keeton and his vision of revising all the rules to make them clearer and easier to understand.").

[8] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Minutes of Meeting of July 13-14, 1990, p. 22, available at http://www.uscourts.gov/rules/ST07-1990-min.pdf (noting end of Judge Weis's tenure as chairman); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Minutes of Meeting of February 4, 1991, p. 1 (listing Judge Keeton as Chair), *available at* http://www.uscourts.gov/rules/ST02-1991-min.pdf; Judge Robert E. Keeton, *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at i, ii, Administrative Office of the United States Courts (1996), *available at* http://www.uscourts.gov/rules/guide.pdf (reporting he was elected chair in 1990).

[9] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at ii.

Rules and five Rules Committees of the Judicial Conference and that "[e]ach committee had its own set of consultants and drafters and its own set of stylistic preferences."[10] The result, according to Judge Keeton, was "five sets of rules that sometimes said almost the same thing, but in different ways and without being clear about whether they meant the same thing."[11]

Initially, the idea of combining all the sets of federal rules into a single set known as the Federal Rules of Practice and Procedure "tempted" Judge Keeton.[12] He saw great benefit in integrating both the style and content of the various sets of federal rules. Recognizing that "substantive integration may prove to be an elusive ideal," Judge Keeton settled on what he called "stylistic integration."[13] Keeton believed that each set of rules should share one drafting style.[14]

In 1991, the Standing Committee created a Style Subcommittee, and Judge Keeton appointed the late Professor Charles Alan Wright, then a member of the Standing Committee, to serve as chair of the Style Subcommittee.[15] In 1993, five years before any of the Restyled Rules became effective, Prof. Wright resigned as Chair of the Style Subcommittee to assume the presidency of the American Law Institute.[16]

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[10] *Id.*

[11] *Id.*

[12] *Id.* at ii ("Some resources might be directed toward a long-term aim of combining all the separate sets of rules into one set, integrated in both style and content: the Federal Rules of Practice and Procedure.")

[13] *Id.*; SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 2, at 3 (reporting creation of a Style Subcommittee).

[14] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at ii ("Having a consistent drafting style in all the rules carries major benefits. Foremost among these, of course, is that clear expression promotes clear thought. Variation, elegant or not, impairs clarity."

[15] SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 3; *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at ii.

[16] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at iii; COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Minutes of Meeting of June 17-19, 1993, p. 2, *available at* http://www.uscourts.gov/rules/Minutes/june1993.pdf ("Judge Keeton also noted that Professor Wright had become president of the ALI and had asked to be relieved of his duties as chair of the Style Subcommittee.")

Though short, Prof. Wright's tenure was essential to the completion of the Style Project. Prof. Wright, along with Judge Keeton, was the "moving force" behind the Style Project, according to Prof. Carol Ann. T. Mooney, a proponent of and participant in the restyling effort.[17] Prof. Wright's chairmanship of the Style Subcommittee lent (and continues to lend) a great deal of credibility to the restyling effort. Judge Keeton was probably putting it mildly when he said that Prof. Wright's writings "rank with the best in legal literature."[18] Prof. Wright was also indispensable in helping Judge Keeton persuade the advisory committees of the need for a comprehensive restyling.[19] Initially, the Style Subcommittee worked on amendments only, but, in the words of Judge Keeton, "the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules—the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure."[20]

Prof. Wright was, in large part, the reason that scope of the Style Project expanded to include entire sets of rules as well as new amendments. The Style Subcommittee recognized early on that the restyling effort would be "arduous" and "time-consuming." None other than a titan like Charles Alan Wright could have persuaded the rules committees to engage in such an effort and pursue it for a more than fifteen years. Without his early involvement, the restyling effort may have died an early, quiet death.

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[17] Carol Ann T. Mooney, *Simplification of the Appellate Rules of Civil Procedure*, 105 DICK. L. REV. 237, 237 (2001) ("The first thing I need to do is thank Judge Keeton, who along with Professor Charles Alan Wright, was the moving force behind the style project for the Federal Rules.").

[18] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at iii ("Because of the importance of this new undertaking, we needed a leader with a demonstrated sense of good writing style. Fortunately, Charles Alan Wright, a dedicated stylist whose writings rank with the best in legal literature, was then serving on the Standing Committee. He accepted the appointment to Chair the Style Subcommittee.")

[19] REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 3 ("Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to undertake the work. . . ").

[20] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at iii.

2. The Goal of the Style Project is Commendable

While it may be easy to understand how figures like Judge Keeton and Professor Wright could persuade the various committees to restyle the federal rules, it is more difficult to determine precisely what motivated these two men to encourage a restyling in the first place. Both men wanted clearer rules, but neither man appears to have publicly articulated a problem with the rules that restyling would fix. Although Keeton was concerned that the many different committees were repeating effort, he must have known that style integration alone would not completely eliminate this problem. Indeed, Before the Style Project neither man published any work identifying problems fixable by restyling or calling for a "restyling" or "style project" of any kind. If Keeton and Wright had motivations for restyling more specific than a desire for clearer rules they did not share them in any formal way beyond the bounds of the rules committees.

Keeton and Wright believed that, while a restyling might solve some then-existing problems with the federal rules, such as making the rulemaking process more efficient and interpretation of the rules easier, the primary reason for restyling the rules was to prevent problems that would inevitably arise as the language became ever more antiquated and separated from actual practice. In short, the Style Project would head off problems at the pass. One of the Advisory Committee's reports to the Standing Committee on Rules of Practice and Procedure reflects the prophylactic nature of the restyling when it states: "Had we not done this work, the rules would have become progressively more difficult to understand and use and more removed from practice."[21]

While Keeton's and Wright's motivations are difficult to discern, the goal of the Style Project is clear. The Advisory Committee itself expressly stated its goal in its Report to the Standing Committee on Practice and Procedure as "clarifying and simplifying the rules, making them easier to use and understand, without changing substantive meaning."[22] Professor Edward H. Cooper[23] succinctly stated the goal of restyling in the title of his

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[21] REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 5.

[22] *Id.* at 2.

[23] Professor Cooper is a Professor at the University of Michigan Law School, the Reporter for the Advisory Committee on the Federal Rules of Civil Procedure, and

article on the subject—"Clarity Without Change."[24] Though there is significant scholarship arguing that "clarity without change" is not achievable, even critics agree that improved clarity is a commendable goal.[25]

The "clarity without change" mantra encapsulates the issue with respect to the Restyled Rules going forward. Because the Restylists have achieved improved clarity but have inadvertently made changes to the law of procedure, the task now is to preserve the benefits of the restyling (improved clarity) while recognizing the need to repair the damage it caused (substantive changes).

3. The Drafting Guidelines Are Largely Non-Controversial

While Judge Keeton and Prof. Wright were the "moving force" behind the Style Project, the people most responsible for developing and applying the project's drafting principles were Bryan A. Garner and Joseph Kimble. At the time Judge Keeton appointed Prof. Wright to be the chair of the new Style Subcommittee, Bryan A. Garner was already a prominent legal writing expert. He was the editor of the *Scribes Legal Writing Journal*[26] and had published the first edition of *A Dictionary of Modern Legal Usage*.[27] In fact, the first members of the Style Subcommittee found themselves consulting Garner's publications on legal writing in the early days of

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played a central role in the restyling project. Report of the Civil Rules Advisory Committee at 4 ("Professor Cooper was the central point for decisions, over and over and over again and, with Professor Rowe and Professor Marcus, provided the research, expertise, and judgment that gave us a reliable basis for many drafting decisions.").

[24] Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1785 (2004).

[25] *See, e.g.*, Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV 155, 156 (2006) ("As have other procedural reformers before them, the Restylists seek to make procedural rules simpler, clearer, more accessible, and easier to understand. I certainly share these goals."); Counseller and Ryan, *supra* note __.

[26] *See* Bryan A. Garner, *From the Editor*, 2 SCRIBES J. LEGAL WRITING iv (1991) ("Probably the last thing American law needs right now is another typical law journal. That was my view even as I agreed to edit last year's inaugural issue of the SJLW.").

[27] Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE, NEW YORK: OXFORD UNIVERSITY PRESS. 1987,

the restyling effort.[28] The Subcommittee also recognized early on how time-consuming and difficult a task restyling was going to be.[29] When the Subcommittee decided it needed a style consultant to lend expertise and help with the workload, Garner was the obvious choice.

The Subcommittee wanted its restyling to improve "clarity, brevity, and readability."[30] Once Garner was hired, the Subcommittee outlined some specific guidelines to achieve those goals.[31] The Subcommittee asked Garner to create a restyled draft of both the Appellate and Civil Rules, employing the guidelines the Subcommittee had agreed upon.[32] The Style Subcommittee reviewed Garner's drafts and then forwarded them to the Civil Rules Committees for approval.[33]

At first, the guidelines Garner and the Subcommittee used to restyle the rules were not set out in any formal way, instead existing only in the notes and minds of the committee members.[34] The Subcommittee came to believe that the drafting guidelines they had agreed upon and employed in the drafting of the restyled Appellate and Civil Rules were "valuable conventions" and "needed to be preserved and collected in a coherent, organized manual."[35] The Style Subcommittee asked Garner to create this "coherent, organized

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[28] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at iii ("Not long after the Subcommittee began its work, we realized just how time-consuming—and arduous—the detailed work on the rules would be. We saw the need for a style consultant . . . we were able to engage Bryan A. Garner, whose books on legal writing the members of the Style Subcommittee were frequently consulting.").

[29] *Id.*

[30] George C. Pratt, *Introduction* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at v, v, Administrative Office of the United States Courts (1996), *available at* http://www.uscourts.gov/rules/guide.pdf.

[31] *Id.* ("With the aid of our consultant, Bryan A. Garner, we initially agreed on and outlined some basic goals, and then more specific guides for achieving those goals."

[32] *Id.* at vi; REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 3.

[33] *Introduction* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at vi.

[34] *See Introduction* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at vi.

[35] *Id.*

manual," and the result was Garner's *Guidelines for Drafting and Editing Court Rules*.[36]

The influence of Garner's *Guidelines* on the Restyled Rules of Civil Procedure can hardly be overstated. The Subcommittee used *Guidelines* as a "handy reference" for its future work and *Guidelines* has become "the accepted style for federal rules."[37] The Advisory Committee note following Rule 1 now states that *Guidelines*, along with Garner's *Dictionary of Modern Legal Usage*, provided "Guidance in drafting, usage, and style."[38] Judge George C. Pratt, former Chair of the Style Subcommittee, said that *Guidelines* will "help us as we continue working through demanding, exacting revisions of all of the rules" and it "will provide continuing benefit to future members of the rules committees and ultimately, through the clarity and readability that these Guidelines can produce, to the legal profession as a whole."[39]

The Restyled Rules are the product of both long-established, familiar conventions and principles that Garner and the Style Subcommittee developed as they worked to restyle the rules. According to Garner, *Guidelines* is a "'blackletter' statement of principles[40], followed by illustrations."[41] Garner described some of the principles as "fairly standard" while others, such as the principles on placing conditions and exceptions, are "entirely fresh."[42] Garner acknowledge that the "fresh" *Guidelines* "have no precedent in the literature on legal drafting," instead developing entirely as a result of the restyling effort.[43]

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[36] *Id.*
[37] *Id.*
[38] Adv. Comm. Note to FED. R. CIV. PROC. 1, 2007 Amendment.
[39] *Introduction* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at vi-vii.
[40] In *Guidelines*, Garner did not provide the rationales behind the drafting principles. He did so, however, in *The Elements of Legal Drafting*, Oxford University Press.
[41] Bryan A. Garner, *Author's Note* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at ix, ix, Administrative Office of the United States Courts (1996), *available at* http://www.uscourts.gov/rules/guide.pdf.
[42] *Id.*
[43] *Id.*

Guidelines first sets out what are called "basic principles."[44] The basic principles are the goals the other guidelines are meant to achieve. One can hardly quarrel with basic writing principles like "be clear," "make the draft readable," and "be as brief as clarity and readability permit."[45] *Guidelines* also sets out general conventions to help achieve the basic principles.[46] For example, *Guidelines* calls for drafting the rules in the present tense, in the active voice, and in the singular unless the sense is undeniably plural.

The general conventions also address a number of syntactical issues, including where to place conditions, exceptions, interruptive phrases, and modifiers.[47] *Guidelines* calls for the placement of these kinds of phrases at the beginning or end of a sentence.[48] *Guidelines* also encourages minimizing "of-phrases" by replacing them with possessives and adjectives.[49] For example, Guidelines tells us that a rule should read "an appellant's failure" instead of "failure of an appellant" and "violation of a federal statue" instead of "violation of a statute of the United States."[50] *Guidelines* also demands short sentences—an average of fewer than 25 words per sentence and never more than 30.[51]

Guidelines also demands adherence to certain organizational principles. These principles include:

- Put the broadly applicable before the narrowly applicable
- Put the general before the specific
- Put more important items before less important
- Put rules before exceptions

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[44] Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, 1, Administrative Office of the United States Courts (1996), *available at* http://www.uscourts.gov/rules/guide.pdf.
[45] *Id.*
[46] *Id.* at 3.
[47] *Id.* at 5-12.
[48] *Id.*
[49] *Id.* at 11.
[50] *Id.* at 11-2.
[51] *Id.* at 13.

- Put contemplated events in chronological order[52]

Applying these organizational principles increased the number of subdivisions in the rules. For example, the former Rule 4(a) was a single paragraph setting forth the contents of a summons.[53] The restyled Rule 4(a) is now subdivided into parts (1) and (2).[54] Rule 4(a)(1) is further subdivided into parts (A) through (G).[55]

Kimble tells us that the formatting changes necessitated by adherence to these organizational principles (or "Structure principles as Garner calls them) are likely to be the first thing a lawyer notices when reviewing the Restyled Rules.[56] The Rules also use hanging or "cascading" subparts so that "a rule's hierarchy is made graphic."[57] This means that the provisions are indented below the ones to which they are subordinate. In other words, as one of my first-year law student said, "The rules are outlined for you."

Kimble encourages us to compare the former Rule 14(a) with the Restyled Rule.[58] The Rule 14 comparison Kimble urges reveals convincingly the benefits of the Restylists' formatting conventions. The old Rule 14(a) was a single paragraph of nearly 400 words that contained numerous, distinct joinder rules.[59] The Restylists subdivided Rule 14(a) into a vertical list numbered 1 through 6 and added subtitles to each numbered item in the list, making it easier to understand the various functions of the rules.

The Restylists may, however, be gilding the Lilly with some of their formatting changes. For example, old Rule 4(a) was a single paragraph containing fewer than 100 words setting out the requirements for the form of a summons.[60] The restyled Rule 4(a) has been subdivided into numerous subparts, some subordinate to

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[52] *Id.* at 17.
[53] FED. R. CIV. PROC. 4(a), 28 U.S.C.A. app. (West 1992 & Supp 2007)(amended 2007).
[54] FED. R. CIV. PROC. 4(a).
[55] *Id.*
[56] Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 1)*, 84-SEP MICH. B.J. 56, 57 (2005).
[57] *Id.*
[58] *Id.*
[59] FED. R. CIV. PROC. 14(a), 28 U.S.C.A. app. (West 1992 & Supp 2007)(amended 2007).
[60] FED. R. CIV. PROC. 4(a), 28 U.S.C.A. app. (West 1992 & Supp 2007)(amended 2007).

another. Post restyling, the citation for the proposition that a summons must bear the court's seal is FED. R. CIV. PROC. 4(a)(1)(G), as opposed to FED. R. CIV. PROC. 4(a) before the restyling. As applied to a provision like Rule 4(a), the Restylists' formatting convention does little if anything to improve clarity and may in fact increase citation errors.

While Garner established the drafting guidelines and penned the initial draft of the civil rules, Joseph Kimble served as the primary wordsmith as the Restyled Rules went through draft after draft. Kimble's challenge was to apply Garner's general drafting principles to answer the "myriad style questions that arose during the project."[61] The Advisory Committee created an appendix setting out more than 50 recurring style questions and how it decided to resolve them.[62] The resolution of these issues greatly impacted the text of the Restyled Rules. "Allege" and "allegation" replace "aver" and "averment," "order" replaces "direct," and "crossclaim" replaces "cross-claim."

Kimble and the Advisory Committee also worked to eliminate what Kimble called "intensifiers."[63] According to Kimble, intensifiers are expressions that "might seem to add emphasis" but should be avoided because: 1) they state the obvious; 2) have no practical value; or 3) create negative implications for other rules.[64] Kimble provides the following examples of why intensifiers should be eliminated.[65]

- In *the court may, in its discretion* the discretion clause is an intensifier because may means "has the discretion to."

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[61] *Id.* at 56.
[62] PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE, Appendix A (2005), available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf.
[63] Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 2)*, 84-OCT MICH. B.J. 52, 52 (2005) ("Another difficult challenge was presented by what the Advisory Committee came to call intensifiers.").
[64] *Id.*
[65] *Id.*

- In *If the court deems it advisable, the court may* the if-clause is an intensifier because the court would not be doing something inadvisable.

- In *reasonable written notice* the word reasonable implies that in every other rule that requires notice the notice need not be reasonable.

Kimble and the other Restylists were sensitive to the fact that some phrases are so familiar as to be unalterable, even if the phrases might otherwise be in need of restyling. Kimble calls such phrases "sacred phrases."[66] Examples of such phrases are: "Failure to state a claim upon which relief can be granted," "In equity and good conscience," and "No genuine issue as to any material fact."[67]

For the most part, the Restylists simply applied widely-accepted principles of good drafting. Consequently, the rules are clearer and more readable. No critic claims that the Restyled Rules are less clear or less readable than they were before the Style Project. Instead, much of the criticism of the restyling centered on the notion that no group, no matter how hard they try, can avoid making substantive changes while making top-to-bottom textual changes to the rules.

4. The Restylists Took Extensive Precautions Against Substantive Changes

Despite the criticism, the Restylists believed they could change the words without changing the meanings of the Rules and went to great lengths to do so. They implemented a process for making and reviewing changes that involved procedure experts, style experts, and double and triple-checking for substantive changes. First, the Advisory Committee's Reporter reviewed Garner's original draft and highlighted possible substantive changes.[68] The style consultants, revised the draft in light of the possible substantive

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[66] *Kimble* (Part 2), *supra* note __, at 55.

[67] *Id.*

[68] *Preface* to BRYAN A. GARNER'S GUIDELINES FOR DRAFTING AND EDITING COURT RULES, *supra* note __, at iii; *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (Part 1), *supra* note __, at 56.

changes.[69] This second draft then went to the Style Subcommittee, which produced a third draft.[70] The Advisory Committee formed two subcommittees, each subcommittee reviewing one half of the rules in the third draft.[71] If a "significant minority" of a subcommittee believed that certain wording worked a substantive change, the language was not approved.[72] The Subcommittees produced a fourth draft, from which the Advisory Committee produced a fifth draft.[73] Additional changes were made in response to suggestions from the Standing Committee on Rules of Practice and Procedure.[74]

The Restylists are confident that their precautions allowed them to change the words of nearly all the rules without changing the meaning of even one. The Advisory Committee believes that the transition from the old to the Restyled Rules will be seamless and predicted that within a few years nobody would remember that there had been a style project. [75] Kimble proclaimed "Everything that applied before this style project applies after the project."[76]

Despite this confidence, the Restylists took the precaution of adding the following language to every Committee Note—"These changes are intended to be stylistic only."[77] Edward Cooper describes the need for the note.

> One of the central difficulties of the style enterprise is that new words are capable of bearing new meanings. Advocates will seize on every nuance and attempt to wring advantage

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[69] *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (Part 1), *supra* note __, at 56.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 5. ("The irony is that if we did our work well—and we have—the new rules will seamlessly take the place of the old.").
[76] Kimble (Part 1), *supra* note __, at 56.
[77] *Id. See, e.g.*, FED. R. CIV. PROC. 1 Adv. Comm. Note.

> from it . . . We cannot effectively prevent that process, and we may not wish to. But the committee notes are a vehicle for attempting to restrain these impulses.[78]

The purpose of the note is not so much to prevent substantive change so much as it is to discourage frivolous arguments for it. On the other hand, if the new language does in fact change meaning, one wonders what good the note will do, particular to those textualist judges for whom the Restylists' intent and the Restyling Amendments' purpose carries little if any weight.[79] A change in language can change meaning, irrespective of what the Committee intended.

Perhaps it is not even possible to change language without changing meaning.[80] The Restylists have not managed to avoid substantive changes (as discussed below in Section ___). It is the as-yet unidentified substantive changes that are the most worrisome. As one prominent critic said after identifying and reporting substantive changes to the Advisory Committee, "If the Advisory Committee's distinguished members, advisors, consultants, and reporter missed things that I caught, I have to believe that others will catch things that we all missed."[81] Obviously, nothing can be done with undiscovered substantive changes, but the Restylists' efforts to avoid substantive changes, not to mention the substantial contribution of the Group, provide at least some hope that such changes are few and easily fixed.

5. The Restyled Rules are More Readable Than the Former Rules

On the whole, the restyled federal rules are clearer and more readable than their predecessors. As someone who has already presented the Restyled Rules to a group of first-year law students, I can tell you that students overwhelmingly prefer the Restyled Rules.

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[78] *Cooper*, supra note __, at 1783.
[79] *Against (Mere) Restyling,* supra note __, at 168-9 (pointing out that by omitting a rule of construction the Advisory Committee "give ammunition to *both* those who rely on plain text *and* those who rely on the lawmakers' purpose.").
[80] *Id.* at 165.
[81] *Id.*

One student's comment is representative: "they're easier to read and they're already outlined for us."

It should come as no surprise that the restyled federal rules are clearer and easier to read. After all, they are the result of the application of accepted principles of good writing—short sentences, no redundancy, avoid the passive voice, etc. Consider the example Professor Kimble provides comparing Rule 8(e)(2) with the restyled rule.

> **Rule 8(e)(2):** When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.
>
> **Restyled:** If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.[82]

Nobody has complained that the restyling of this particular provision of Rule 8 has caused a substantive change, and it is hard to argue that the old version is clearer than the new, restyled provision.[83] This example is not an isolated one. The Restyled Rules are consistently more readable than the old rules. Even critics of the rules were impressed with the readability of the Restyled Rules.[84] Prof. Hartnett opposed the Restyled Rules, but even he was impressed with their clarity and readability.[85] Without question, the Restyled Rules give

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[82] Kimble (Part 1), *supra* note __, at 57.

[83] The restyled version of this provision, however, is now set out in Rule 8(d)(2) rather than Rule 8(e)(2), and some critics have complained that the Restyled Rules renumber certain provisions and that this renumbering will cause confusion and citation errors. *See, e.g.*, Jeffrey S. Parker, *Postponing the 2007 "Restyling" Amendments to the Federal Rules of Civil Procedure*, George Mason University Law and Economics Research Paper Series, p. 6, note 10 (2007), available at http://ssrn.com/abstract_id=1016221 (citing examples of authors of law review articles having to redirect readers to the "old" law in the new "clarified" version of the rule, including Phillip A. Pucillo, Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal, 59 Oklahoma L.Rev. 271 (2006)).

[84] *Hartnett*, *supra* note __, at 157. *See also* Stephen B. Burbank and Gregory P. Joseph, MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, p. 5, (Oct. 24, 2005) (noting that a minority of the Group favored a continuation of the project and noting broad support for the goals of the restyling).

[85] *Hartnett*, *supra* note __, at 157.

us clearer words, but there is a lingering concern that they have at least in some instances distorted meaning.

B. The Burbank-Joseph Group Improved the Restyled Rules

The purpose of the Burbank-Joseph Group ("the Group") was to determine whether the Restylists had achieved their goal of improving clarity without changing meaning. Aside from the Restylists themselves, no group had more influence on the Restyled Rules than the Group. The Group formed as a result Edward Cooper's call for the Bench and Bar to "examine the Restyled Rules with punctilious care."[86] Realizing, as Cooper himself had said, that no single person could effectively review all of the rules, Professor Stephen Burbank and Greg Joseph formed a distinguished group of eleven law professors and ten practitioners to review the Restyled Rules.[87] Burbank and Joseph chose the members of the group for "their demonstrated knowledge and experience, intelligence and common sense, not of any knowledge as to their attitudes or likely attitudes toward the restyling effort."[88] Few could quibble with the quality of the membership of the Group.[89]

The Group did not set out to undermine or support the restyling effort.[90] Burbank and Joseph believed that "informed comment" on the Restyling Amendments was critical, but they also believed that few individuals would be able to make the effort necessary to provide meaningful comment on the rules.[91] The formation of the Group allowed for a sharing of the substantial

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[86] *Id.* at 156-7 (quoting Cooper, *supra* note __, at 1785.)
[87] *Id.*; MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 1.
[88] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 1.
[89] The academician members of the Group were Professors Stephen Burbank, Janet Alexander, Kevin Clermont, Edward Hartnett, Geoffrey Hazard, Arthur Miller, James Pfander, David Shapiro, Linda Silberman, Catherine Struve, and Tobias Wolff. The practitioners were Gregory P. Joseph, Scott J. Atlas, Allen D. Black, David R. Buchanan, Robert L. Byman, Robert Ellis, Francis H. Fox, William Hangley, Loren Kieve, and Patricia Lee Refo. MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 7.
[90] *Id.* at 1.
[91] *Id.*

workload necessary to achieve the "informed comment" Burbank and Joseph felt was critical. The Group divided the Restyled Rules into ten groups and assigned teams of two to review each group of rules.[92]

The Group identified three categories of problems with the Restyling Amendments. In the first category are those amendments that would "unquestionably" change the meaning of a rule.[93] In the second category are those amendments that give rise to a "reasonable argument" that meaning would be changed.[94] The third category consists of those amendments that were "hard to read or would be hard to cite."[95]

In the fall of 2005, the Group submitted more than 200 pages of comments (including a side-by-side comparison of the Restyled and Former Rules) to the Standing Committee.[96] The Group identified more than 130 amendments that it believed fell within one of the categories.[97] Where the Group identified a problem, it suggested a solution—usually either an alternate language change or reversion back to the original word or phrase.[98] .

As for what the Group referred to as the "big picture question"—whether a restyling of the federal rules should occur at all—a minority of the group believed the restyling should continue while the majority was opposed to a continuation of the project.[99] The minority supported a continuation of the restyling effort, despite a belief that some unintended changes in meaning were inevitable.[100] In the view of the minority, the Restyled Rules were more accessible, particularly to the less experienced practitioner.[101]

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[92] *Id.*
[93] *Id.* at 2.
[94] *Id.*
[95] *Id.*
[96] *See, generally* COMMENTS ON THE PRELIMINARY DRAFT OF THE PROPOSED STYLE REVISION (WITH SIDE-BY-SIDE RULES COMPARISON), (Hereinafter "COMMENTS ON STYLE REVISION"), BURBANK-JOSEPH GROUP (2005).
[97] *Id.*
[98] *Id.*
[99] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 5-6.
[100] *Id.* at 6.
[101] *Id.*

Most of the participants in the Group were "either mildly or strongly negative."[102] One member's description of his initial impressions may represent the majority:

> On my first few passes, making the [s]ide-by-side reading and comparison between the existing rule and the proposed restyled rule that Professor Cooper had encouraged, I was impressed . . . Yet as I dug further, moving beyond comparison of two texts to an examination of judicial interpretations of the current rule and asking whether the restyled rule might change that interpretation, I became more and more concerned. The more I looked, the less sanguine I became. By the time I concluded my review, I decided that I could not support the adoption of the Restyled Rules.[103]

The majority expressed concerns that any benefits of restyling were outweighed by the uncertainty regarding a change in meaning as well as what the Group referred to as "transaction costs," such as the need to learn the new rules and pay for the new treatises.[104] The Group majority also expressed concern that the restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century."[105] The Group majority did not believe that the Bar would tolerate having to relearn the rules more than once in a generation.[106]

The Group's criticisms did not fall entirely on deaf ears. The Advisory Committee described the Group's study as "thorough" and expressed its gratitude for the Group's work.[107] The Advisory Committee also decided to conduct the hearing in a roundtable discussion format instead of the typical witness-testimony format—a

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[102] *Id.*
[103] *Hartnett*, *supra* note __, at 157.
[104] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 6.
[105] *Id.*
[106] *Id.*.
[107] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, 2 (Dec. 2005), *available at* http://www.uscourts.gov/rules/Reports/CV12-2005.pdf.

format more conducive to a give-and-take discussion about the changes the Group felt were necessary.[108]

In November of 2005, the Advisory Committee held the roundtable discussion of the Group's findings and comments with Burbank and Joseph.[109] As a result of the meeting, the Advisory Committee made changes to the draft of the Restyled Rules presented for public comment. The Advisory Committee added Rule 86(b) to address the Group's concern that the Restyled Rules would supersede federal statutes.[110] The Advisory Committee also made changes in response to the Group's rule-by-rule comments on the restyling. As to many of the more than 130 amendments the Group identified as problematic, the Advisory Committee either made the change the Group suggested or made a different change to solve the problem. In dozens of other cases, the Advisory Committee chose not to make any change in response to the Group's comments.

Despite the Advisory Committee's responsiveness to the Group's comments, the Advisory Committee's actions did not convince all members of the Group to support the restyling effort.[111] The serious problems the Group found and brought to the attention to the Advisory Committee may have been just the tip of the iceberg. A common view amongst the members of the Group was that despite the care they took in their work they could not possibly have identified all the problems with the rules.[112] The Group had identified what it believed to be serious problems with the Restyled Rules and believed that, given the problems twenty-one lawyers and law professors found in a non-adversarial environment, it is

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[108] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Minutes of Meeting of Jan. 6-7, 2006, p. 14, *available at* http://www.uscourts.gov/rules/Minutes/ST01-2006.pdf.

[109] JANUARY 2006 MINUTES OF THE MEETING OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 14; DECEMBER 2005 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 2.

[110] MAY 2006 MINUTES OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 15 (Acknowledging that public comment on the style project included "concern that the supersession effects of the Civil Rules would be expanded by promulgating the entire body of the Civil Rules to take effect on December 1, 2007").

[111] Hartnett, *supra* note __, at 156.

[112] *Id.* at 164-5; see also MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, supra note __, at 6 (noting that a "commonly expressed view" amongst the members of the Group opposing continuation of the project was regardless of the care the Restylists have taken there are likely to be many as yet unidentified problems.).

inevitable that additional problems would be exposed, the number and magnitude of which could not be known until they were subjected to litigation in federal courts around the country.[113]

The importance of the Group study can hardly be overstated. Both critics and supporters of the restyling effort must agree that the now-effective Restyled Rules are better off for the input of the Group. The Group study and the Advisory Committee's response to it also teach two important lessons for maximizing the chances of the rules success—1) the Restylists did not succeed in avoiding substantive changes in the draft presented for public comment, which should help convince the Advisory Committee that the now-effective rules still contain substantive changes; and 2) the Advisory Committee is committed to avoiding substantive changes and is willing to make the changes necessary to avoid them.

III. CRITICS *MUST* ROOT FOR THE RESTYLED RULES

Like it or not, the Restyled Rules now govern procedure in all civil cases in the federal district courts and affect the rights and obligations of millions of litigants. To wish for their failure is to wish harm upon the integrity of our court system. Some critics will simply hope for the best, believing that since the rules are already in effect there is nothing else to be done, but this position is untenable because support of the critics will likely be necessary to ensure that the Advisory Committee reverses the substantive changes (discussed in section IV., A. below) it inadvertently made to the Rules.

Others may continue to criticize the rules in hopes of returning to the former rules. This position is also untenable because at this point we will not, and should not, return to the former rules. The Advisory Committee believes deeply in the quality of the Restyled Rules and is heavily invested in their success. Even if we ought to go back to the old rules, it is highly unlikely that the advisory committee would allow it. Moreover, at this point, we should not go back to the old rules. Many of the arguments against enactment of the Restyling Amendments that were valid on November 30, 2007 became invalid after the rules' December 1, 2007 effective date. For example, transition costs that once weighed

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[113] Hartnett, *supra* note ___, at 165.

against enacting the Restyling Amendments now weigh in favor of making the best of them. Much of the cost of transitioning to the Restyled Rules has already been incurred and switching back to the old rules now would involve its own substantial transition cost. In short, we are past the point of no return to the old rules.

A. There's No Going Back to the old Rules (Even if We Should)

The Advisory Committee is extremely confident in the Restyled Rules and is not about to resurrect the old ones. Once the project was complete, the chair of the Advisory Committee boasted to the Standing Committee that the Restylists had "done their work well" and expected a "seamless" transition to the Restyled Rules.[114] So confident is the Advisory Committee in its work product that its then Chair went on to predict that in a few years everyone will have forgotten that there ever was a restyling.[115] One can argue that their confidence is unjustified, but the magnitude of their confidence is certainly a better predictor of their willingness to repeal the Restyled Rules than is the degree to which they are justified in being confident.

To be fair, the Advisory Committee has reason to be confident. As discussed above, the stature of the Restylists and the meticulous nature of their work justify some confidence. Moreover, the Restylists have already heard the criticisms of their effort. In some cases, they changed the rules in response to the criticism, but they do not appear to have considered abandoning the project altogether.

Confidence aside, the Advisory Committee is too invested in the Restyled Rules to reverse course. To resurrect the old rules would be to throw away a decade and a half of painstaking work on the part of dozens of individuals. While it is a fair to say that all of that work at this point is a sunk cost, the advisory committee is unlikely to ignore its own effort in determining whether or not to reverse course. Like it or not, the old rules are gone for good.

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[114] JUNE 2006 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, supra note __, at 5.
[115] *Id.*

B. We Should Not Go Back to the Old Rules

At this point, it would be more difficult to go back to the old rules than to make the best of the Restyled Rules. Once valid arguments against enacting the Restyling Amendments are not also valid arguments for resurrecting the old rules. This is true for three principal reasons. First, we have already incurred much of the cost imposed by the restyling. Second, switching back to the old rules now would involve its own substantial transition costs. Third, switching back to the old rules would exacerbate some of the cost incurred as a result of the restyling.

1. Much of the Cost of Transitioning to the Restyled Rules Has Already Been Incurred

Critics resisted the Restyling Amendments on the ground that the costs of transitioning from the old rules to the Restyled Rules would overwhelm any benefit the Style Project would bring in the form of increased clarity. Professor Jeffrey Parker, a prominent critic of the Restyling Amendments, devoted a large part of his critique to the transitional costs or the "switching costs," as he called them. He summarized his criticism as follows: "Like the suggested replacements for the QWERTY keyboard, even if the Restyled Rules were 'better' in some hypothetical sense, the switching costs will dominate, and the net result will be negative."[116]

According to Parker law professors will have to spend extra time teaching law students because they will have to teach both the old and new rules and lawyers, especially those experts in the old version of the rules, will make mistakes because of the change in language.[117] Parker says these costs and other switching costs will be passed on to litigants and the courts in the form of increased fees, courts costs, and mistakes.[118] Parker says, "In the end, as always, taxpayers and citizens will bear the largest share of the burden."[119]

Parker also complains about the time and energy devoted to revising and expanding existing books and treatises as well as the need for "still more books, articles, and CLE programs to re-educate

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[116] Parker, *supra* note__, *at 5.*
[117] *Id.*
[118] *Id.*
[119] *Id.*

the Bench and Bar on 'restyling.'"[120] Parker complains that "forests will be consumed in reprinting every book and pamphlet containing the Civil Rules."[121]

Parker was right to be concerned about the trees when he published his criticism, but the trees are dead now. That the transition costs outweigh any benefits of a restyling is a perfectly sensible point, but only before the transition costs have been incurred. At this point, publishers have already printed new books, practitioners have attended the CLEs, and authors have already updated their treatises.[122] To return to the old rules now would require more CLEs (e.g. "Heading for the Hills – a Return to the Old FRCP") – and more treatise and pamphlet revisions and certainly even more dead trees as publishers reprint their rule books and treatises.

Parker also lamented what he called the "cascading effects on other rules systems."[123] Specifically, Parker was concerned that local rules would have to be reexamined, and that the restyling of the federal rules is likely to require a reexamination of the rules of procedure in every state whose rules are modeled on the federal rules. Going back to the old rules, even now, might still save us some of these costs, but they are probably not so great to begin with. Since local rules may not conflict with an FRCP,[124] the need to reexamine and amend them will arise only if the Restyling Amendments make a substantive change that is actually at odds with a local rule.

As for state rules, the extent of those transition costs will depend largely on the smoothness of the federal court transition. The education costs already incurred to transition to the federal rules will not all have to be repaid to transition to state Restyled Rules because there is overlap between the constituencies of the various sets of rules.

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[120] *Id.*

[121] *Id.* It seems to me this ship sailed long before the Restyling Amendments became effective. Publishers reprint their copies of the rules each year and needlessly consume trees ensuring that law professors have no less than six brand-new, identical copies of the federal rules, whether we need new ones or not.

[122] *See, e.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1181 (3d ed. 2007) (noting the restyling of Rule 7).

[123] *Postponing the Restyling Amendments*, *supra* note __, at 5.

[124] FED. R. CIV. PROC. 83(a) ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 . . .").

Not everyone agreed that the benefits of restyling justified the "switch over" costs. At this point, however, there is no turning back the clock to prevent the time and effort that the bench and bar expended to learn the Restyled Rules. These costs are sunk and must not guide future decisions regarding the Restyled Rules.

2. Switching Back to the Former Rules Will Hinder Efforts for More Substantial Reform

Some opposed the Style Project on the ground that it made more substantial reform nearly impossible. Professor Harnett despaired that "the restyling may ultimately stand as the best that this generation accomplished in procedural reform."[125] A single generation of attorneys may only be able to absorb one major overhaul to the rules.[126] Moreover, the time-consuming process of restyling may have already delayed other needed amendments to the rules.[127] This criticism was well-founded when it was made, but reverting to the old rules now will only further delay other needed reform.

Even the Restylists acknowledged that the restyling delayed other work. In January of 2006, in her report to the Standing Committee, Judge Rosenthal, Chair of the Advisory Committee, acknowledged that the restyling and electronic discovery projects had caused the Advisory Committee to "put aside a number of other issues."[128] The Advisory Committee recognized that there is a limit on how quickly the rules constituencies can absorb new amendments, as demonstrated by the fact that there will be no amendments to the Federal Rules of Civil Procedure becoming effective in December of

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[125] *Hartnett*, *supra* note __, at 178.

[126] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 6.

[127] *Id.* (expressing the concern that the restyling might "retard the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century."); *Hartnett*, *supra* note __, at 178.

[128] JANUARY 2006 MINUTES OF THE MEETING OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 15 (

2008.[129] A number of amendments, however, are in the public comment phase of the process.[130]

The Style Project has certainly not prevented the Advisory Committee or the Standing Committee from attending to at least some other matters. Whether or not the Bar will rebel against additional changes to the rules because of the recent furious pace of amendments remains to be seen, but the Advisory Committee is certainly sensitive to the fact that the Bar (and the Academy for that matter) needs time to absorb new amendments. Despite the Committee's continued work, however, Hartnett's point that the Style Project prevented more important reform is still valid. The truth is that we will never know what procedural reforms will not take place because of it. Such reforms fall into the ether of "what might have been." Reversion to the old rules, with all of its corresponding transition costs, would only further delay needed reform.

3. We Should not Trade One set of Citation Errors and Research Difficulties for Another

The restyling was resisted on the ground that it would increase the number of citation errors in court documents. The risk of citation errors has increased for two reasons. First, by further subdividing rules into additional subparts, one has more subparts to which to cite, therefore, increasing the opportunities for an inaccurate citation. The hyper-articulation of Rule 4(a), discussed above, is a good example.

The Restylists recognized that extensive renumbering would cause at least a "short-term inconvenience" and so tried to minimize it.[131] The Restylists did not change any rule numbers, except that Rule 25(d)(2) is now Rule 17(d) (allowing a public officer sued in his official capacity to be designated by official title rather than by

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[129] *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 20-22 (Sept. 2007), *available at* http://www.uscourts.gov/rules/supct0108/ST_Comm_Rpt_Sept_2007.pdf.

[130] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE 4, *available at* http://www.uscourts.gov/rules/Brochure_0807.pdf.

[131] *Kimble* (Part 2), *supra* note __, at 55.

name).[132] The remaining rule numbers remain unchanged. Rule 12 is still the rule addressing defenses and objections,[133] Rule 4 still addresses the summons,[134] Rule 18 is still the claim joinder rule, and so on.[135]

At the subdivision level, however, the changes are quite extensive. For example, former Rule 12(d), titled Preliminary Hearings, is now Rule 12(i), titled Hearing Before Trial. In all, the Restylists renumbered more than forty subdivisions. The Restylists deleted three subdivisions altogether because they believed they were redundant or, in the last case, outdated—Rule 26(a)(5) (listing the various discovery devices), Rule 55(d)(applying the default judgment provisions of the rule to all parties regardless of how the party is denominated), and Rule 81(f)(referencing a now non-existent government official).

The Group unsuccessfully tried to persuade the committees to reexamine the extensive use of subparts because of the increase in citation errors it would cause.[136] The Group proposed using bulleted lists rather than numbered or lettered lists in order to get the accessibility benefits of a more highly articulated rule while avoiding the problem of having to cite to additional subdivisions.[137] The Restylists rejected this proposal,[138] and even the Group was uncertain about how to quote a bullet.[139]

The changes at the subdivision level are all the more problematic because the restyling also changes the language of the rules, meaning that attorneys will not be able to rely on an identity of

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[132] FED. R. CIV. PROC. 1, adv. comm. note 2007 Amendments.
[133] FED. R. CIV. PROC. 12.
[134] FED. R. CIV. PROC. 4.
[135] FED. R. CIV. PROC. 18.
[136] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 3 ("It is not clear, however, that adequate attention has been paid to the potential costs . . . of elaborate articulation and subdivision, costs that include both the effort involved in citing with precision and the consequences of the greater number of errors in citation that are predictable the more highly articulated a rule becomes.").
[137] COMMENTS ON STYLE REVISION"), supra note __, p. 41, Comment to Restyled Rule 12(a)(1)(A).
[138] *See* FED. R. CIV. PROC. 12(a)(1)(A) (retaining subparts (i) and (ii)).
[139] *COMMENTS ON STYLE REVISION*, supra note __, p. 41, Comment to Restyled Rule 12(a)(1)(A) (stating that "for practical reasons" the groups preference is to combine the subdivisions (i) and (ii) because "how does one deal with bullet points in quoting a rule in a sentence.")

language or numbering when researching a particular provision. This problem is particularly pernicious in an age of electronic research. Professor Parker describes this concern in his paper on the subject.

> . . . [R]esearch in annotated rules or statutes, or digests, is no longer the dominant mode of legal research. Today, most legal research is conducted through computerized text-searching, so that that new-found clarity will deprive the researcher of direct access [to] the unchanged prior law.[140]

For their part, the Restylists recognize that extensive renumbering and addition of new subdivisions can cause problems. Professor Kimble answered some of the criticisms in the second of his two-part series on the Restyling Amendments.

> Any reordering was done at the subdivision level—(a), (b), (c)—or lower . . . Even then, the Committee changed only when it was satisfied that the improved sequencing outweighed the possible short-term inconvenience. Throughout this project, the Committee had to balance two competing interests. On the one hand, the current designations are familiar, and changing them will occasionally require users to make adjustments. On the other hand, this chance to set the rules in order—or better order—may not come along for another 70 years, and we should take the long view.[141]

According to Kimble, any problems caused by renumbering and adding subdivisions will constitute a mere "inconvenience" well worth suffering in order to have a better order for the rules.[142] The Restylists did not renumber those provisions "burned" into the users' memories; i.e., Rule 12(b)(6) is still Rule 12(b)(6). The Restylists also provided a comparison chart.[143] The chart is referenced in the

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[140] Parker, *supra* note __, at 6-7.
[141] *Kimble* (Part 2), *supra* note __, at 54.
[142] *Id.*
[143] CURRENT AND RESTYLED RULES COMPARISON CHART, available at http://www.uscourts.gov/rules/supct1106/Current_and_Restyled_Rules_Comparison_Chart.pdf.

note following Rule 1, which serves as an introduction and guide to the Restyled Rules as a whole.[144]

Despite these precautions, some citation errors and research difficulties are likely, but, to revert to the old rules now, would only create new difficulties. Opinions already include citations to the renumbered provisions in the Restyled Rules. Finding this authority would be difficult after putting the provision back in its original position. Swapping one set of difficulties for another is not a workable solution.

IV. MAXIMIZING THE LIKELIHOOD OF THE RESTYLED RULES' SUCCESS

Even a critic like me can stomach rooting for the success of the Restyled Rules, especially in light of the fact that there is no longer a realistic alternative to them. But merely rooting for the Restyled Rules is not enough. The Advisory Committee will have to take action to maximize the likelihood that they will be successful.

A. The Advisory Committee Should Repair Two Substantive Changes Resulting from the Restyling

That the Restylists failed to avoid substantive changes to the Rules, despite their best efforts, should come as no surprise. The most serious criticism of the Style Project has always been that the Restylists had not and could not avoid making changes to the law of procedure. This criticism goes straight to the heart of the restyling effort because the goal was to achieve clarity without change. Changing the words of the law without changing its meaning may not even be possible, especially when multiple committees with rotating members are making top-to-bottom changes to dozens of rules, many of which are nearly seven decades old. Seven decades of use and court interpretation will charge even the most antiquated and awkward words with meanings not easily separated from the words that gave rise to them in the first place.

Professor Rory Ryan and I questioned the value of restyling given that the Restylists sought to improve only clarity of language

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[144] FED. RULES CIV. PROC, Appendix B; FED. RULES CIV. PROC. 1, adv comm. note, 2007 Amendments.

rather than clarity of meaning.[145] In doing so, we echoed a concern of Professor Hartnett, who complained of extensive changes to the rules without the desire to create a better procedure, or even a different procedure.[146] Professor Parker argued that the clarity without change "slogan" is untenable because "words cannot be detached from their meanings."[147] Even some of the Restylists do not seem certain that clarity without change can be achieved. Professor Carol Ann T. Mooney, who was the Reporter to the Advisory Committee on the Appellate Rules of Procedure during the restyling of the appellate rules, said that "you cannot separate content or substance from style" and that the "dividing line between style and substance is probably even more illusive and ephemeral than that between substance and procedure."[148] She concludes, like Prof. Parker, that content cannot be separated from the words used to express it.[149]

Only when the Restyled Rules are subjected to the crucible of litigation will we know the extent of the substantive changes in the Restyling Amendments. Neither the Group nor the Advisory Committee has the same ability or incentive to find the changes the Bar does. In all likelihood, there are substantive changes that the Advisory Committee and the Group missed. What is certain is that there are two substantive changes that the Group caught but the Advisory Committee refused to make. Both of these changes are undesirable but easy to fix. The Restylists deleted Rule 26(a)(5) and eliminated the requirement that stipulations governing discovery procedures be in "writing." Both of these changes alter the law of procedure for the worse. The Advisory Committee should repair this damage as soon as possible.

1. The Advisory Committee Should Reinsert Former Rule 26(a)(5)

The Restylists eliminated Rule 26(a)(5) altogether. Rule 26(a)(5) indexed the various discovery instruments. The provision was titled "Methods to Discover Additional Matter" and provided:

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[145] Counseller and Ryan, *supra* note __.
[146] Harnett, *supra* note __, at 156.
[147] Parker, *supra* note __, at 7.
[148] Mooney, *supra* note __, at 238.
[149] *Id.* at 237.

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.[150]

Looking at the text of this provision alone, without benefit of the case law, the provision appears to be a merely redundant index of the discovery instruments, all of which are mentioned in separate rules. The abrogation of Rule 26(a)(5) is a substantive change, however, because courts relied upon it to overcome arguments that certain procedures did not constitute discovery devices and, therefore, did not need to be propounded within the discovery period. Specifically, attorneys argued that Rule 36 requests for admission[151] and Rule 45 subpoenas are not discovery devices and may be served and must be answered outside the discovery period.[152]

Again, the Group reported to the Committee the problem with abrogating the provision, even citing cases in which the provision was used to defeat arguments that requests for admission and Rule 45 subpoenas are not discovery devices.[153] The Restylists certainly heard and understood the Group's argument against abrogation of the provision. The Advisory Committee noted that the Group's criticism with respect to the elimination of Rule 26(a)(5) was "fascinating."[154]

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[150] FED. R. CIV. PROC. 26(a)(5), 28 U.S.C.A. app. (West 1992 & Supp. 2007)(amended 2007).

[151] Joseph L. v. Conn. Dep't of Children & Families, 225 F.R.D. 400, 402 (D.Conn. 2005). *But see* Hurt v. Coyne Cylinder Co., 124 F.R.D. 614, 615 (W.D.Tenn.1989).

[152] *See, e.g.*, Dag Ent., Inc. v. Exxon Mobile Corp., 226 F.R.D. 95, 104 (D.D.C. 2005) (Plaintiff arguing Rule 45 subpoenas not subject to ordinary discovery deadlines). *But see* Mortgage Inf. Serv., Inc. v. Kitchens, 210 F.R.D. 562, 567 (W.D.N.C. 2002) (noting that a Rule 45 subpoena is not "discovery" when used to secdure the production at trial of originals of documents previously disclosed).

[153] *COMMENTS ON STYLE REVISION*, supra note __, p. 82, Comment on Proposed Deletion of Rule 26(a)(5)("Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes.")(citing *Joseph L*, 225 F.R.D. at 402 and Parker v. Learn the Skills Corp., 2004 U.S. Dist. LEXIS 21498, *8, n. 4 (E.D.Pa. 2004)).

[154] NOTES ON THE BURBANK-JOSEPH REPORT, CIVIL RULES ADVISORY COMMITTEE, p. 10, (First Draft).

At least initially, the Advisory Committee seemed to share the Group's concern when it noted, "If deleting the seemingly redundant index will encourage lawyers to make such arguments, or will cause courts greater difficulty in rejecting them, we might rethink this style choice."[155] Despite this indication that the Committee would reconsider its decision, the Restyled Rules do not contain the provision, nor do they contain any other "seemingly redundant index" of discovery devices.

One can understand the Restylists' position that 26(a)(5) is merely redundant when examining the language of the rule in isolation, but case law has assigned Rule 26(a)(5) an importance beyond a mere redundant index of discovery devices. As the Group reported to the Committee, "Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes."[156] The case law is replete with examples of courts relying upon Rule 26(a)(5) to reject arguments that certain instruments are not discovery devices.[157]

The Committee should amend Rule 26 to restore Rule 26(a)(5). Though the provision may be redundant in a sense—other

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[155] *Id.*

[156] *COMMENTS ON STYLE REVISION*, supra note __, p. 82, Comment on Proposed Deletion of Rule 26(a)(5).

[157] *Dag Ent.*, 226 F.R.D. at 104 ("subpoena pursuant to Federal Rule of Civil Procedure 45 to a third-party is not exempt from discovery deadlines in scheduling orders. Rather, contrary to Plaintiffs' assertions, Rule 45 subpoenas are "discovery" under Rules 16 and 26 of the Federal Rules of Civil Procedure, and are subject to the same deadlines as other forms of discovery."); Integra Lifesciences I, Ltd. v. Merck KGaA, 190 F.R.D. 556, 561 (S.D.Cal.1999) ("Case law establishes that subpoenas under Rule 45 are discovery, and must be utilized within the time period permitted for discovery in a case."); Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 177 F.R.D. 443, 445 (D.Minn.1997) (subpoenas under Rule 45, invoking the authority of the court to obtain the pretrial production of documents and things, are discovery within the definition of Fed.R.Civ.P. 26(a)(5) and are therefore subject to the time constraints that apply to all other methods of formal discovery); Rice v. United States, 164 F.R.D. 556, 558 (N.D.Okl.1995) ("After careful consideration, the Court finds that the Rule 45 subpoenas duces tecum in this case constitute discovery."); see also Puritan Inv. Corp. v. ASLL Corp., Civ. No. 97-1580, 1997 WL 793569, at *1 (E.D.Pa. Dec. 9, 1997) ("Trial subpoenas may not be used, however, as a means to engage in discovery after the discovery deadline has passed."); BASF Corp. v. Old World Trading Co., Civ. No. 86-5602, 1992 WL 24076, at *2 (N.D.Ill. Feb. 4, 1992) ("Here, discovery has been closed for almost eleven months, and the court will not allow the parties to engage in discovery through trial subpoenas.").

rules reference each of the discovery devices mentioned in Rule 26(a)(5)—none of the other rules explicitly refer to each device as "methods to discovery additional matter" and state that the discovery devices mentioned in Rule 26(a)(5) are the methods by which "Parties obtain additional discovery." Case law makes clear that Rule 26(a)(5) has become the "rule" courts rely upon to dispel such arguments.

2. The Advisory Committee Should Replace the Written Stipulation Requirement in the Discovery Rules

The Restylists substituted the word "stipulation" for the words "written stipulation" throughout the discovery rules. The discovery rules no longer require a written stipulation to modify discovery procedures. This change is substantive and undesirable.

The Group highlighted the "written stipulation" problem for the Advisory Committee. In its report to the Committee, the Group said: "The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other Restyled Rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 59(c))." [158] While it is clear from the Advisory Committee's work product that it was aware of the Group's comment on the change, the record does not make absolutely clear why the Advisory Committee chose not to make the recommended change.[159] The deletion of "written" appears to be a result of the effort to "reduce inconsistencies by using the same words to express the same meaning."[160] In the committee note following Rule 1, we are told that one inconsistency was that the rules used the terms "agree," "consent," and "stipulate," and only sometimes qualified these terms with the word "written."[161] The elimination of the word "written" appears to be the product of the Restylists effort to reduce the number of variations. The note tells us that, with respect to the handling of the term stipulation and similar terms, "none of the

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[158] *COMMENTS ON STYLE REVISION*, supra note __, p. 90, Comment on Restyled Rule 29(b).

[159] NOTES ON THE BURBANK-JOSEPH REPORT, supra note __, at 3.

[160] FED. R. CIV. PROC. 1, advisory committee note, 2007 Amendments.

[161] *Id.*

changes, when made, alters the rule's meaning."[162] This claim is false.

The minutes of the May 2006 meeting of the Advisory Committee show that the committee discussed the "global issue" of the rules' use of the words "agree," "consent," and "stipulate."[163] With respect to the elimination of the word "written," the minutes state only that "Almost all agreements are reduced to writing, at least in electronic form. Careful practitioners invariably dispatch a confirming memorandum."[164] The Advisory Committee's response to the criticism, then, is that the change would not result in a substantive change so long as lawyers comply, not with a rule's requirements, but with the commands of a careful practice. This position is simply not an answer to the criticism that elimination of the word "written" is a substantive change. The Advisory Committee is not, or at least should not be, writing rules just for the "careful practitioner."

The Restylists' substantive change will have a broad impact because numerous rules contained the phrase "written stipulation." Former Rule 29 required a written stipulation in order for the parties to modify procedures governing discovery, including the time, place, and manner in which depositions are taken.[165] Former Rules 30(a)(2)(A) and 31(a)(2)(A) allowed parties to stipulate in writing that they may take more than ten depositions.[166] Former Rule 33(a)(2)(A) allowed the parties to serve more than 25 interrogatories on another party so long as the parties so stipulated in writing.[167] Former Rule 36(a) permitted parties to modify by written stipulation the time limits for serving and the deadlines for responding to requests for admissions.[168] The restyled version of each of these

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[162] *Id.*

[163] MAY 2006 MINUTES OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note __, at 8.

[164] *Id.*

[165] FED. R. CIV. P. 29, 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[166] FED. R. CIV. P. 30(a)(2)(A) (Depositions Upon Oral Examination) and 31(a)(2)(A) (Depositions Upon Written Questions), 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[167] FED. R. CIV. P. 33(a)(2)(A), 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[168] FED. R. CIV. P. 36(a), 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

rules eliminates the requirement of a written stipulation, requiring instead a mere "stipulation."[169]

The danger of the restyled discovery rules is that they will force courts to spend a great deal of time exploring whether an oral stipulation exists and, if so, what its terms are. The former rule allowed courts to simply rely on the written requirement in the rules and avoid the morass of determining whether an oral agreement existed. For instance, in one case, the defendant failed to answer plaintiff's requests and interrogatories on the ground that both parties had agreed the defendants did not have to respond to them.[170] Both sides provided the court with affidavits supporting their positions—the plaintiff's that no agreement existed and the defendant's that one in fact did exist.[171] Citing to former Rule 29, the court decided that it did not need to resolve the conflicting affidavits, saying "in the absence of such a written stipulation, there simply has not been an enlargement of time."[172] The court went on to expressly hold that in order to obtain additional time within which to respond to discovery, "a party must either obtain a written stipulation signed by all the parties or an Order of the Court enlarging the time."[173] That district court is not alone. Several other courts, including the Third Circuit Court of Appeals, have refused to enforce alleged oral agreements by relying upon the express written requirement in the discovery rules.[174] These holdings are clearly at odds with the Restylists' position that eliminating the word "written" does not work a substantive change.

A number of courts have eloquently expressed why a written requirement is desirable. The District of Massachusetts explained:

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[169] *See* FED. R. CIV. P. 29, 30, 33, and 36.

[170] Tropix, Inc. v. Lyon &Lyon, 169 F.R.D. 3, 3 (U.S.D.Mass 1996).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298 (1995)(refusing to allow a party to adopt another party's discovery requests in absence of written stipulation and noting that plaintiff failed to comport with Rule 29's requirement of a written stipulation.); Clean Earth Rem and Const. Serv., Inc. v. American Int'l Group, Inc., 245 F.R.D. 137, 139 (S.D.N.Y 2007); Eastman v. Ameristep Blinds, Inc., 2007 U.S. Dist. Lexis 43493, *3 (E.D.Mich 2007) (stating that Rule 29 requires a written stipulation to "avoid the present situation where conflicting recollections or interpretations of verbal communications are all that is presented for the court's use in making a determination.")

"the requirement of a written stipulation was promulgated to avoid just the sort of dispute which has arisen in this case in which one attorney asserts that the attorney for the other side agreed to an enlargement and the attorney for the other side denies that any such agreement exists."[175] The court continued, "Manifestly, it would be a waste of judicial resources were the courts required to resolve such disputes when the alternative is that all counsel need to do is enter a written stipulation in order to effect an enlargement of time."[176] Just this past year, the Eastern District of Michigan refused to enforce an alleged oral agreement, explaining that Rule 29 "requires written stipulation in order to modify the limitations placed on discovery, precisely to avoid the present situation where conflicting recollections or interpretations of oral communications are all that is presented for the court's use in making a determination."[177]

Unfortunately, by eliminating the requirement of a written stipulation, the Restylists are forcing courts to engage in the "waste of judicial resources" the Massachusetts and Michigan district courts were concerned with and which the written stipulation was designed to prevent. No longer able to rely upon the word "written" in the discovery rules, courts will have to expend the time and effort necessary to determine, first, whether the parties reached an agreement and, if so, second, what the terms of that agreement were. The elimination of this single word from the discovery rules will force courts to increase the already extraordinary commitment of time and resources to the adjudication of discovery disputes. The reported cases cited are surely but a tiny fraction of the unreported cases in which courts rely upon the provision to avoid adjudicating swearing matches regarding oral stipulations.

The elimination of "written" may also discourage cooperation during discovery. Practitioners will avoid discussing the possibility of a stipulation for fear of a dispute over whether the discussion was in fact an oral and, under the new rules, enforceable stipulation.

The Committee can and should avoid a substantive change and its undesirable consequences simply by reinserting the word written before the word stipulation in rules 29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), and 36(a)(3).

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[175] *Tropix*, 169 F.R.D. at 3.
[176] *Id.*
[177] Eastman, 2007 Lexis 43493 at *3.

B. The Advisory Committee Should Continue to Resist Any Call for a Rule of Construction to Prevent Supersession

The supersession issue arises from the language of the Rules Enabling Act. The Rules Enabling Act not only authorizes the Supreme Court to create rules of practice and procedure for federal district courts,[178] the Act also provides that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[179] This provision is known as the supersession clause of the Rules Enabling Act. Because of the supersession clause, the Supreme Court, through the rule-making process, can enact a rule that displaces an Act of Congress.[180] Prior to the effective date of the amendments, commentators were concerned that the Restyling Amendments would trump statutory provisions[181] because all the rules of procedure would be stamped with a new effective date. Critics, including members of the Group, were concerned that the Restyling Amendments would supersede prior federal statutes.[182] One critic urged the Advisory Committee to include a rule of construction in the Restyled Rules that prohibited courts from giving the rules an interpretation that conflicted with a law in effect before the December 1, 2007 effective date of the Restyled Rules.[183]

In response to these concerns, and the concerns of the Group in particular, the Advisory Committee amended Rule 86(b) in an attempt to prevent the Restyling Amendments from having supersession effect. Rule 86(b) now reads:

> **December 1, 2007 Amendments.** If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in

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[178] Rules Enabling Act, 28 U.S.C. § 2072(a).
[179] *Id* § 2072(b).
[180] Id. (properly promulgated rules supersede "all laws" in conflict with them.). *See also Hartnett*, *supra* note __, at 171.
[181] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 4 (saying that the supersession clause caused the "most difficult problems" the Group confronted); *Hartnett*, *supra* note __, at 171.
[182] MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note __, at 4 (saying that the supersession clause caused the "most difficult problems" the Group confronted); *Hartnett*, *supra* note __, at 171.
[183] *Hartnett*, *supra* note __, at 177.

> time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

With Rule 86(b), the Restylists were working against a background of jurisprudence in which there are two basic supersession analyses. Some courts follow a last-in-time rule—i.e., later enacted rules trump earlier statutes and later statutes trump earlier rules.[184] Other courts look at the purpose of the rule or amendment to determine supersession.[185] These purposovist courts do not give supersession effect to rules enacted to improve style or clarity.[186] For these courts, the Restyling Amendments would not supersede other laws, irrespective of their effective date, because their purpose was to improve clarity.

As Professor Hartnett notes, these two approaches to the supersession issue "mirror[] the conflict in approaches to interpretation generally."[187] The last-in-time judges tend to be textualists, and those who look at the purpose of the rule to determine supersession are purposovists. Hartnett believed that a rule of construction was needed to prevent supersession.[188] Hartnett proposed two different rules of construction, both of which prohibited a court from construing a restyled rule to conflict with any law in effect prior to the December 1, 2007 effective date of the Restyling Amendments.[189]

This section of the article discusses why a rule of construction, such as the one Hartnett proposed, is unnecessary and would be harmful. The Restyled Rules are unlikely to cause significant supersession problems in the first place, but Rule 86(b) probably resolves any supersession problems the Restyled Rules would have otherwise caused. Most importantly, even if the Restyled Rules might supersede other laws, a rule of construction only exacerbates interpretational problems associated with the Restyled Rules.

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[184] Floyd v. U.S. Postal Serv., 105 F.3d 274 (6th Cir. 1997); Hartnett, *supra* note __, at 173.
[185] Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1485, n. 8 (10th Cir. 1993); Hartnett, *supra* note __, at 173.
[186] *Id.*
[187] Hartnett, *supra* note __, at 175.
[188] *Id.* at 177.
[189] *Id.*

1. Rule 86(b) Prevents Restyling Supersession

Rule 86(b) is likely to prevent courts that might have otherwise done so from giving the Restyled Rules supersession effect. For purposovists, Rule 86(b) is, admittedly, unnecessary to prevent supersession because their decision on the supersession issue does not turn on a "priority in time" analysis.[190] Thus, judges of the purposovist interpretational approach were unlikely to give the Restyled Rules supersession effect, regardless of their effective date. The Restyling Amendments make clear in every committee note that their purpose is to improve the style and clarity of the federal rules, not to make substantive changes. Because the purpose of the Restyling Amendments is merely to improve clarity and style, the purposovist judges will not give them supersession effect, irrespective of the timing of their enactment compared to other, potentially contradictory federal statutes.

Rule 86(b) will, however, be effective in preventing a textualist judge from giving supersession effect to the Restyling Amendments. If and when a court reaches the point in its supersession analysis where the effective date of the rule becomes relevant,[191] Rule 86(b) simply requires the court to ignore the Restyling Amendments' effective date. Essentially, Rule 86(b) makes the effective date a non-event for purposes of the supersession analysis.

Hartnett argues that a rule cannot have an effective date for one purpose—satisfying the notice requirements of the Rules Enabling Act—and not for another—the priority in time analysis under 2072(b).[192] Hartnett sees Rule 86(b) as an attempt to govern the interpretation of a federal statute—section 2072 of the REA. Hartnett says, "a Rule can't tell us how to interpret a statute—unless a statute so provides" and Rule 86(b) violates this limitation on rulemaking authority because Congress has not given the Supreme

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[190] *Id.* at 173 (citing *Autoskill*, 994 F.2d at 1485, n. 8).

[191] *See id.* (citing Callihan v. Schneider, 178 F.3d 800, 803-04 (6th Cir. 1999) and saying "it did not matter to the Court of appeals that Rule 24(a) had been amended in 1998 as part of the restyling of the Federal Rules of Appellate Procedure or that the meaning of Rule 24(a) was the same after 1998 as it had been before the 1996 amendments to the *in forma pauperis* statute. The key issue was which of two conflicting rules was last in time.")

[192] *Id.*

Court the power to "'fix the extent' to which a Rule would 'take effect' for purposes of § 2072(b)." [193] If Rules could tell us how to interpret statutes without statutory authorization, Hartnett says, then the amendment to §2072 authorizing rules that define when a ruling of a district court is final for purposes of appeal under §1291 would have been completely unnecessary.[194]

On the other hand, Rule 86(b) is probably better read, not as a rule governing construction of section 2072, but as a rule that prohibits a particular interpretation of the Restyling Amendments. While a rule cannot govern statutory interpretation, it can govern the construction of a rule.[195] The central inquiry in any amendment-based supersession analysis is whether the amendment reflects intent to abrogate a prior, conflicting law.[196] Of course, the fact that a rule's effective date is later than the law with which it conflicts is an indication that such intent exists.[197] Thus, the phrase "priority in time" should not be seen as a product of attempts to interpret section 2072. Instead, it is better viewed as a product of attempts to interpret the rules themselves, i.e., whether the rules reflect an intent to abrogate prior laws. Rule 86(b) does not change the effective date of the rules, or make them ineffective for a particular purpose. Instead, it prohibits a court from inferring intent to abrogate a prior law based upon the Restyled Rules effective date.

Even if Hartnett is correct—that rule 86(b) is an impermissible attempt to govern statutory construction—the remedy is to eliminate the provision altogether, not to add a rule of construction. Ironically, the Restylists would have preferred to leave out Rule 86(b) in the first place. Neither the restyled appellate or rules or criminal procedure rules contains such a rule to prevent supersession. If courts do seize upon Hartnett's argument, the solution is to remove Rule 86(b), not to add a rule of construction.

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[193] *Id.*

[194] *Id.*

[195] *See, e.g.*, FED. R. CIV. PROC. 1 (requiring the Rules to "be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

[196] *Callihan*, 178 F.3d at 802-3 (noting that "repeals by implication are not favored by courts")(citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442, 107 S.Ct. 2494, 2497-98, 96 L.Ed.2d 385 (1987); Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936)).

[197] *Id.* ("[W]hen provisions of two acts are not reconcilable, the later act constitutes an implied repeal of the earlier statute.")(internal citations omitted).

2. A Rule of Construction Would Exacerbate Interpretational Difficulties

The supersession issue changed on the effective date of the Restyling Amendments. Before December 1, 2007, the issue was whether the risk of supersession outweighed the benefits of the Restyling such that the Style Project ought to have been terminated. Now that the amendments are law, the issue is how to make the best of them. Now the critical task is to take the steps most likely to reduce or prevent the supersession problems that concerned both critics and Restylists alike. A rule of construction preventing an interpretation of the Restyled Rules that conflicts with prior laws will only compound the difficulties in transitioning from the old to the Restyled Rules.

Assuming the Restylists would not give up the project altogether, Professor Hartnett favored a rule of construction over Rule 86(b) as a solution to the supersession problem. Hartnett proposed two alternatives. His first option was:

> No provision in Rules 1-5.1, 6-73, or 77-86, as amended effective December 1, 2007, may be construed to conflict with another law in effect on November 30, 2007.[198]

His second option was:

> All provisions in Rules1-5.1, 6-73, or 77-86, as amended effective December 1, 2007, must be construed to be consistent with all other laws in effect on November 30, 2007.[199]

A rule of construction is untenable because of the problems it will cause with conflicts that predate the Restyling Amendments. A rule of construction would have an impact on all supersession issues, even those not created by the restyling. A rule of construction might force a court to change the meaning of a rule in order to comply with the rule of construction even when the apparent conflict was not

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[198] Hartnett, *supra* note __, at 177.
[199] *Id.*

created by the restyling. Consider the following example. A reasonable and common reading of Rule R conflicts with the reasonable and common reading of statute S on November 30, 2007, one day before the effective date of the Restyling Amendments. A reasonable and common reading of Restyled Rule R leads to the same conflict with Statute S on December 1, 2007. When the conflict becomes an issue in a case, the court will be forced to give Rule R a different reading than the reasonable and common one, not because it is the best interpretation, but because the court is commanded to give the Rule a reading not in conflict with the statute.

And what if the rule *should* be construed to conflict with a prior law, not because it has been restyled, but because the circumstances and accepted cannons of construction demand it? Surely courts had not yet exhausted all of the interpretational issues in the Federal Rules of Civil Procedure even before the restyling. A rule of construction such as those proposed above limits the possible meanings to be assigned a particular provision. What if it eliminates the best meaning? As Prof. Cooper pointed out on behalf of the Restylists, while substantive changes are a thing to be avoided, freezing the meaning of the rules, or even severely curtailing the meanings they can possess is also to be avoided.[200]

A possible response to the "freezing" point is that that a rule of construction would only need to prevent courts from construing the *restyled* portion of the rule to conflict with prior laws. Even if such a rule of construction did not "freeze" meaning, at a minimum, it would require courts to determine whether the conflict is one caused by the restyled rule or the former rule. The rule of construction would force courts to treat the Restyling Amendments as a mask on the Federal Rules. With each supersession analysis, courts would have to determine if it was the masked Rules or the unmasked Rules that conflicted with the other law, and apply the rule of construction only when the masked rules caused the conflict. This approach to supersession, however, presupposes that the Restyling Amendments can be cleanly excised from the Rules and that what remains would be the former Rules. But this is not the case. The restyled and former provisions of the rules now exist as an integrated whole. The textual changes resulting from the Restyling are so pervasive that it would be difficult to excise the Restyling

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[200] Cooper, *supra* note __, at 1767.

Amendments and have something meaningful remain. The Restyling Amendments are not a mask on the Federal Rules now. They are its face. And its arms, legs, and body for that matter.

V. CONCLUSION

We need the Restyling Amendments to succeed because the just adjudication of the rights and obligations hundreds of thousands of federal civil litigants depend upon their success.[201] Too much is at stake to hope for a "we told you so" moment. A time may come when we critics can say that the Style Project's benefits did not justify its costs. But to what end would we say it? The former Rules are gone and they are not coming back. We have no choice but to make the best of the Restyled Rules, and the stature and hard work of both the Restylists and the members of the Group make rooting for them an easier pill to swallow. But whether it is easy or hard to root for the Restyled Rules, we all, especially us critics, must do it. It will take broad support to convince the Advisory Committee to repair the substantive changes to the discovery rules. And as the Group pointed out, there are likely to be other undesirable substantive changes that have yet to be found. So, critics cannot withdraw from the discussion of the Restyled Rules. Instead, they must be on the lookout for these changes and lead the way in addressing them when they are discovered. Ironically, the Restyled Rules require from all of us the very thing that probably would have stopped the Style Project in the first place—vigilance. In the end, the most important lesson of the Style Project may be that most of us, me included, need to be more careful stewards and observers of both the Rules and the rulemaking process. In this sense, the Restyled Rules do not ask anything different from us than the old Rules did. So, from now on, let us call the Restyling Amendments by their proper name—the Federal Rules of Civil Procedure.

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[201] Federal Judicial Caseload Statistics, *supra* note __, Table C.